

Minutes
WARRICK COUNTY AREA BOARD OF ZONING APPEALS

Regular meeting to be held in the Commissioners Meeting Room,
Third Floor, Historic Courthouse,
Boonville, Indiana
October 22, 2018 at 6:00 P.M.

PLEDGE OF ALLEGIANCE

MEMBERS PRESENT: Jeff Valiant, Chairman; Terry Dayvolt, Doris Horn, Paul Keller, Mike Moesner, Jeff Willis, and Mike Winge.

Also present were Morrie Doll, Attorney, Molly Barnhill, Assistant Director, and Katelyn Cron, staff.

MEMBERS ABSENT: None

MINUTES: Upon a motion made by Mike Moesner and seconded by Mike Winge the Minutes of the last regular meeting held on September 24, 2018 were approved as circulated.

BZA-SU-18-14

APPLICANT: Liberty Mine, LLC by Alex Messamore, Manager Land Acquisition and Permits

OWNER: Alcoa Fuels Inc, Alcoa Warrick LLC, H&L Farms LLC, Lackehart, Inc C/O Donald H. Keith, Hart, Hart, Peake & Robertson, Tweedy Farms Trust.

PREMISIS AFFECTED: 2,720 acres located on the South side of New Harmony Rd and 796 acres located on the South side of Millersburg Rd approximately 1 mile Northwest of the intersection formed by Eskew Rd and Millersburgh Rd. Boon & Ohio Twp.

NATURE OF CASE: Applicant requests a Special Use, SU 13, for the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, IN to allow mineral extraction, storage, and processing in an Urban Area in a “CON” Conservancy & Recreational Area and “A” Agricultural Zoning District. (Advertised in the Standard July 5, 2018.) *Continued from July 18, 2018 and August 24, 2018 and September 24, 2018*

Attorney Morrie Doll stated the Board received a request to continue that matter and he had spoken with Sherri about it, they had spoken with council for Liberty Mines and agreed on one more continuance to the November 26th Board of Zoning Appeals regular meeting. He stated we informed council that this has been on the agenda since July and we were sensing that this needed to be resolved, either by an agreement by the two disputing parties or the hearing should go forward. He added the council understood and indicated that there had been some progress to the point in time where they are actually exchanging agreement documents among the attorneys for the various parties. He stated now remember this includes the town of Boonville, the home owners association, the urban area to the adjacent, Alcoa, Warrick County LLC, the other owners of the real estate and lastly, Liberty Mine. He added the council acknowledged that and understood that they are to present an agreement to the Board by November 26th or it would be set for a Special Meeting on November 26th at some future date. He added not the meeting on

the 26th, but the selection of the Special Meeting date would occur. He stated again, the reason this would be set as a Special Meeting would be because there would be a large number of remonstrators who had indicated their desire to appear and speak at that hearing, which we didn't think would be appropriate or sufficient enough time if we started at 6 p.m. on a regular meeting date. Morrie said with Sherri's consent, Molly was present, we would ask that the Board continue this until the November 26th date with those conditions.

Mike Winge stated he had a question for Attorney Doll.

Attorney Doll replied yes.

Mike Winge asked when would that extension for the Special Meeting be, would it be way down the road.

Attorney Doll replied you would be setting it, you would be setting the Special Meeting.

Mike Winge stated so they understand that that could come up very shortly after the meeting.

Attorney Doll said that would be totally up to the Board to decide when. He added our rules permit the President to ask for a Special Meeting or any two members to ask for a Special Meeting. He stated if an applicant asked for a Special Meeting it was by Board decision when that would occur.

Mike Moesner stated so we are assuming at the next meeting we would be picking a future date or...

Attorney Doll said he was hopeful they would have an agreement and the Board could consider the merits of the SU-13 at the November 26th meeting subject to whatever the negotiated terms and conditions between all the disputed parties, and then they could decide if it is acceptable to Warrick County. He added they may have an agreement, which would allow the Board to proceed on that night with deciding it, or they may not. He said if they don't then it would be asked to be set for a final Special Meeting hearing date, which the Board would determine.

Mike Winge stated with them understanding that it would be sooner rather than later.

Attorney Doll said that was up to the Board.

Paul Keller asked they will not meet in December right, normally or...

Attorney Doll replied no, they do meet in December. He stated if there are applications they try to meet each month so that property owners can go on. He said maybe last year they didn't because they didn't have an application.

Molly Barnhill added usually it was slow in November and December.

Paul Keller asked Morrie if they come to an agreement that doesn't necessarily mean that there would be no remonstrators.

Attorney Doll stated no, he could not represent to the Board that all of the remonstrators were being represented by the lawyers in the negotiation. He stated he thought the majority of them were, but he didn't know if every single one of them was. He added the Board may have some independent remonstrator that nobody had the ability to speak for those who would want to stand up and be heard if there was even an agreement among all the others.

Mike Winge asked Attorney Doll if he thought it would require a Special Meeting if they came to an agreement.

Attorney Doll replied if history repeated itself, no. He said if they came with an agreement he did not think it would require a Special Meeting, it was only if they came with no agreement that the Board would need to block some period of time. He said nobody liked the idea of staying until four in the morning considering the great egg case, but as the Board knew he thought due process was they cannot stop the hearing once they started, because that gave an undue advantage to one side over the other. He added if one side presented half the case and then the other side got a thirty-day continuance to present their half in response he thought that would be a problem. He said so once they started this; his advice to the Board was that they finished it. He said if there were going to be numerous remonstrations because there was no agreement, his advice would be that they do set it for a Special Meeting at the time they could sacrifice their private time to come back to hear it, because they don't know how long it would be. He said it may be 2 hours or it may be 5 hours, one never knows until we get started.

Doris Horn stated they just need a motion to...

Attorney Doll stated continue it to the November 26th meeting.

Mike Winge made a motion to continue the application until the next regular meeting. The motion was seconded by Doris Horn and unanimously approved.

Tom Tweety came to the podium. He stated he was a property owner in that permitted area and didn't quite hear everything that was said but he thought they were doing a continuance in November.

Attorney Doll asked for the Liberty Mine site.

Mr. Tweety replied yes, sir.

Attorney Doll replied yes.

Chairman Valiant added yes and that was the last continuance.

Mr. Tweety stated that was a tentative meeting right.

Attorney Doll stated no, that was a regular scheduled meeting.

Mr. Tweety said okay.

Mike Winge added it was to be the last one.

Mr. Tweety said he understood what they said about how they may come to an agreement but if no agreement then...

Attorney Doll stated then it would be set for a separate special time.

Mr. Tweety replied okay, appreciate your time.

BZA-SU-18-19

OWNER & APPLICANT: American Land Holdings of Indiana LLC by Chad Sullivan, Attorney

PREMISES AFFECTED: Property located on the S side of Holder Hill Rd. approximately 0 feet SW of the intersection formed by Holder Hill Rd. and Weyerbacher Rd. Hart, Greer, Campbell, and Boon Townships.

NATURE OF CASE: Applicant requests a Special Use, SU-13, from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, IN to allow Mineral extraction in a Flood Hazard area as adopted by ordinance effective August 2, 2012. (Advertised in the Standard September 13, 2018). *Continued from September 24, 2018*

Present were Chad Sullivan, Attorney for American Land Holdings Inc. and Mark Miller, Attorney for Mark Hendrickson.

Attorney Chad Sullivan stated they were there tonight to ask for the setting of a special hearing, for this to be heard. He said Mark Miller was there representing Mr. Hendrickson who had filed an objection. He stated it was their intention to amend their petition which they hoped would address Mr. Hendrickson's objection, so that was part of the reason they were asking for it not be heard that night but to be set for a special hearing. He said he had talked to Mr. Miller and both of the parties were available the week of November 12th. He stated he knew it was the Board's discretion of when to set that but he wanted the Board to know they were wanting to get this resolved sooner rather than later, and that was why they had gotten together and looked at their calendars to see if the week of November 12th works for a Special Meeting.

Attorney Doll stated they had received this request and Sherri and he had also talked about it, and they didn't have any objection to the continuance. He stated he did have a question for him and Mr. Miller because Sherri asked him something. He said it seemed to him that, Mr. Sullivan, your client was proposing to amend their application and he took it the purpose of that amendment would be to exclude from the SU-13 the property owned by Mr. Miller's client, which was in the permitted area in the application to DNR.

Attorney Sullivan replied correct.

Attorney Doll stated it seemed to himself and Sherri, Mr. Miller, that the strongest argument Mr. Hendrickson had was, in his objection that was filed, was a question of ownership of the real estate. He stated in the fact that some of the ground within the SU-13 application was not owned by...

Attorney Sullivan stated American Land Holdings.

Attorney Doll stated thank you, not owned by American Land Holdings, not owned by Peabody and not under contract for the mineral extraction at least that was the argument. He said he would not say which one was right and which one was wrong between the parties, but if an amended application was filed, did they need a Special Meeting. He said was this the kind of thing they could deal with in a normally scheduled meeting on November 26th if an amended application addressed that issue.

Attorney Miller stated that was the "if", if it adequately addressed the issue then they should be able to speak to Mr. Sullivan and work something out.

Attorney Doll stated what he had asked Mr. Sullivan to do if he did amend it was to get a definitive description of the ground in question to be excluded. He added now, whether or not the two parties agreed on what that ground to be excluded was or not he did not know. He said it was not their business to get into.

Attorney Sullivan stated he did not foresee that being an issue.

Attorney Miller said Mr. Sullivan brought this up before the meeting and he hadn't had a chance to talk to his client. He said that was one reason he was hesitating.

Attorney Doll asked did either party object that he recommend to the Board that they do not set this for a Special Meeting if they were intending to file an amendment and they set it instead for the November 26th regular meeting. He said this was a lay-member board and he hated to drag them away from their families, their jobs, their lives, their careers and everything else. He said he knew with Jeff and everyone else it got very difficult bringing everyone together, so if the crux of the objection was addressed by the amendment then, which they are still free to argue against it anyway although he thought that would be something they would want to talk about. He asked why they don't set this for November 26th.

Attorney Sullivan replied his concern, especially in light of what he had heard before they came up there, was they may be hearing the Liberty Mine issue in some part that evening.

Attorney Doll said the Board would hear one of two things, Mr. Sullivan. He said they would hear that they had an agreement and they may have a few individual remonstrators but the bulk of them would be participating by joint council, most of the remonstrators or any group of homeowners, as they may know, are represented by council. He stated so if they had an agreement and they had council's agreement then he thought the remonstrations period on the 26th would be very small in time. He said they might even agree that your application could go first on the agenda of the 26th. He stated if they did not have an agreement, as they heard them say, all they were going to be doing on the 26th of November was setting a Special Meeting. He stated they would not get into a disputed SU-13 at that meeting for Liberty. He stated it was Sherri and his conversation that, he apologized for not getting back to them because it was late that afternoon, it was a conversation between the Executive Director and himself about why they needed to do a Special Meeting if they had resolved principally Mr. Hendrickson's objection in the amended application.

Attorney Sullivan stated he guessed that was still an "if", so they would not know that until they filed the amendment and Mr. Miller talked about it with his client. He stated if it did not resolve all of his issues and they did have to have the full hearing on the merits he thought that would take some substantial time.

Attorney Doll asked what amount of time they thought it would take between the two parties.

Attorney Sullivan replied they were planning to bring at least 5 or 6 witnesses. He said he had filed a supplemental objection today that they needed to go through more thoroughly. He said he thought their presentation would be an hour to an hour and a half to address all the issues that were currently pending in the objection.

Attorney Doll asked would Mr. Hendrickson be bringing outside witnesses in, or not.

Attorney Miller replied there were a couple but he did not see it taking that long.

Attorney Doll said okay, the staff would ask that the amended application be submitted two weeks prior to the hearing where it will be considered, because they want to review it.

Attorney Sullivan replied sure.

Attorney Doll stated that means maps and other things may have to be changed compared to what they had previously filed so keep that in mind. He said he would return to the question; would they be able to get this done on the 26th or do they feel strongly it should be set for a separate Special Meeting or would they like to reserve the right to see if they could do it on November 26th but if they are not quite ready they could ask could to continue it one more time.

Attorney Sullivan stated his client's preference was to set it for a special hearing.

Attorney Doll asked during the week of the 12th.

Attorney Sullivan stated yes, during the week of the 12th.

Doris Horn stated the 12th was the Planning Commission.

Attorney Doll stated the 12th was a Holiday, nobody was working the 12th it was Veteran's Day. He stated they would meet on the 13th for the APC except they had nothing on the agenda on the 13th of November. He said they had thought about the 13th, hadn't they.

Mrs. Barnhill replied they had, but that meant they would like the amended application filed by the 29th, next Monday.

Chad Sullivan said no problem, it was his intent to have it filed by the end of the week.

Attorney Doll asked Mr. Miller what was your calendar like on the 13th.

Attorney Miller replied it was open.

Attorney Doll stated ladies and gentlemen of the Board the request would be to settle for a special hearing, they do not have an APC meeting...

Mike Moesner asked was that the second Tuesday of the month.

The Board replied yes.

Mike Moesner stated he had a standard meeting, he was a treasurer and he had to sign checks and things like that that night.

Attorney Doll stated he understood. He asked was there any other conflict with the 13th by any member.

Chairman Valiant asked if they were talking about during the day or in the evening.

Attorney Doll said well that would be the next question.

Mrs. Barnhill stated there are other meetings that go in here. She stated it would have to be no earlier than 6.

Attorney Doll agreed, stating the Commissioners meet at 4:00 p.m., the Drainage Board and Storm water would meet at 2:30 so...

Mike Winge stated if they did not have any more remonstrators that shouldn't be a problem.

Attorney Doll stated the Board doesn't know because they are working around construction, not very effectively, but they were and so they tried to pick things up on Mondays because they know they are in there. He said he didn't know if they did that on Tuesday's or other days.

Mrs. Barnhill said the room should be done by then.

Mike Winge stated even if it was not, it should be down to a small amount.

Mike Moesner stated if everyone else could make it the Board wouldn't need him.

Attorney Doll said he knew that, he was just curious about how late the meeting would run.

Mike Moesner replied that his meeting started at 6:00 and at least 7:00 to 7:15.

Attorney Doll stated so members of the Board...

Attorney Miller interrupted Mr. Doll may I say something.

Attorney Doll replied yes.

Attorney Miller stated he just wanted to be open with the members of the Board. He said without knowing what the amendment was going to be he was hesitant to say that thirty to forty-five minutes was what they would need. He stated that was all they had planned for this application, so he was assuming that if it was scaled back in the way it was discussed then it should not take any longer.

Attorney Doll said he understood, Mark.

Attorney Miller stated curve balls are curve balls.

Attorney Doll asked what the wishes of the President were.

Chairman Valiant asked what the Board's wishes were. He said the 13th worked for him, but...

Doris Horn added the 13th worked for her.

Mike Moesner said if everyone else could make it that was fine.

Mike Winge made a motion to continue the application to a Special Meeting held on November 13, 2018 at 6:00 p.m. The motion was seconded by Terry Dayvolt and unanimously approved.

Attorney Doll asked (Attorney Sullivan) when would they get Molly an amended application.

Attorney Sullivan replied yes, no later than the 29th.

Lowell Ours came to the podium stating he lived at 9955 Seven Hills Road, Elberfeld, Indiana. He said he would like to know exactly what the railroad was going to do with this mine. He asked were they wanting to put a spur through there or something, and how close would it be to his house. He said he didn't want them to shake him out of his house like he was afraid they would do. He stated he had lived up there almost all of his life and he would hate to see it...

Attorney Doll asked which one this would be on.

Chairman Valiant said this would be American, Peabody.

Mr. Ours continued was there an issue with Pigeon Creek Bottoms and endangered species when Peabody wanted to mine it. He asked now was it true that this coal mine was wanting to mine the Pigeon Creek Bottoms?

Attorney Doll Mr. President this Board does not have jurisdiction over endangered species.

Chairman Valiant stated right.

Attorney Doll stated there had been an argument made by this gentleman (referring to Attorney Miller) on behalf of his client that the American application does impair endangered species so he would be a better person to ask that question to, and he may be able to tell you whether the Pigeon Bottoms was included in it as a wetland area that is going to be mined or not and lastly, he may know whether there was a railroad spur to be constructed that you are concerned about. He stated maybe he would be generous enough to try and answer your questions.

Mr. Ours said he lived right at the intersection of Seven Hills and Schultz Road and he wondered how close they were going to be to him.

Chairman Valiant said he hadn't seen a map yet.

Attorney Doll (referring to the map) stated they think it was there.

Attorney Miller said there was a mine permit application pending for Seven Hills.

Attorney Doll said not this one.

Attorney Miller said not this one but right next to this one.

Attorney Doll said alright. He asked do you have time to come into the Area Planning Commission office tomorrow to look at this map.

Mr. Ours stated yes sir.

Attorney Doll said it would seem to him that if he could review this in the APC office he could determine whether or not he thought this permit was affecting him and if not they would tell you.

Mr. Ours stated he had heard so many rumors about Pigeon Creek and all that. He said you know you hear so much.

Molly Barnill replied the APC had both applications in their office and they could find where the property was and see which one would be affecting it.

Mr. Ours asked where the office was. He stated he had never been there before.

Attorney Doll replied one floor down.

Attorney Miller stated he was happy to show him.

Molly Barnhill added they were there until 4 p.m. tomorrow.

Mr. Ours said okay, thank you very much.

Attorney Doll asked Chad if Peabody had a second permit pending.

Attorney Sullivan asked on Seven Hills.

Attorney Doll replied yes.

Attorney Sullivan stated he believed that was correct, but he wasn't sure.

Attorney Doll said okay you were not handling that.

Attorney Sullivan said no.

ATTORNEY BUSINESS: None.

EXECUTIVE DIRECTOR BUSINESS:

Mrs. Barnhill stated she had Mrs. Katelyn Cron with her tonight. She said she was a Powless, they may have known her mom Krystal who works upstairs. She added she was going to be helping with meetings now.

Attorney Doll added she works at the APC Office.

Doris Horn made a motion to adjourn the meeting at 6:25 p.m. The second was made by Terry Dayvolt and passed unanimously.

Jeff Valiant, Chairman

ATTEST: The undersigned Secretary of the Warrick County Board of Zoning Appeals does hereby certify the above and foregoing is a full and complete record of the Minutes of the said Board at their monthly meeting held October 22, 2018.

Molly Barnhill, Assistant Director